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NO. 82-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RODNEY WAYNE ELLIS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether or not Petitioner was denied due process or effective assistance of counsel as a result of the trial court's refusal to permit Petitioner to leave the courtroom after the State and he had rested their cases?

2.

Whether or not the trial court properly refused to instruct the jury that after Petitioner had rested his case no further evidence could be considered against him?

3.

Whether or not the trial court properly refused to instruct the jury that after Petitioner had rested his case no further evidence could be considered against him?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Rodney Wayne Ellis, was indicted along with co-defendants Robert M. Hoskins, Brenda Klutz, and Samuel T. Rickman on November 5, 1979, by the Cobb County Grand Jury for violating Georgia's Controlled Substances Act by possessing with the intent to distribute and by dispensing, distributing and delivering cocaine. One of Petitioner's co-defendants, Robert Hoskins, was also indicted under a separate count for possession of methaqualone. (R. 3-4). Co-defendants Ellis, Hoskins, and Rickman were tried jointly, and on February 16, 1981, all were found guilty of possession and

distribution of cocaine. (R. 302). Each co-defendant, including Petitioner Ellis received sentences of twelve years incarceration and five years on probation. (R. 305-310).

Petitioner's motion for new trial was overruled on October 21, 1981 and his notice of appeal to the Georgia Court of Appeals was timely filed on November 13, 1981. (R. 1, 409).

On October 18, 1982, the Georgia Court of Appeals affirmed the convictions and sentences of Petitioner and his co-defendants. Ellis v. State, 164 Ga. App. 366, 296 S.E.2d 726 (1982). (See Appendix A to the Petition). Petitioner's motion for rehearing was denied on October 12, 1982. (Id.). Petitioner's application to the Georgia Supreme Court for a

writ of certiorari was denied on January 5, 1983, and his motion for reconsideration likewise was denied on January 25, 1983. (See, Appendix B to the petition). Thereafter, Petitioner filed this present petition for writ of certiorari in this Court.

PART TWO

STATEMENT OF THE FACTS

A detailed rendition of the facts supporting the conviction of the Petitioner and his co-defendants, is set out in the Georgia Court of Appeals decision on Petitioner's direct appeal. Ellis v. State, 164 Ga. App. 366, 366-367, 296 S.E.2d 726 (1982). (See Appendix A to the petition). The facts essentially established that on August 18, 1979, an undercover agent

working for the Cobb County Police arranged for a $54,500 purchase of cocaine from Petitioner's co-defendant, Hoskins. (T. 334-336, 339). Arrangements were made for the cocaine to be brought to a Best Western Motel on Monday, August 20, 1979. (T. 340).

The Cobb County undercover agent and Hoskins and his female companion, Brenda Klutz, rented adjoining rooms at the Best Western Motel. Room 107 was rented by the agent and 105 was rented by Hoskins and Klutz. (T. 349, 352). An informant who helped arrange for the transaction with Hoskins had informed police authorities that Hoskins had connections in Alabama which could supply cocaine. (T. 332). After being directed to remain in his

room by Hoskins, the undercover agent asked if he could meet the people from Alabama, but Hoskins advised him that they did not want to meet anyone. (T. 350).

The undercover agent, the informant, Hoskins and Klutz, waited in the agent's room for the people to arrive from Alabama. (T. 351). During the wait of approximate one hour, Hoskins brought a sample of the cocaine to the agent's room. (T. 353-354).

During this time, Cobb County surveillance units observed a gold colored Trans-Am automobile with an Alabama license tag driving to the rear of the motel and parking beside Hoskins' vehicle. (T. 52-53). Two white males later identified as Petitioner Ellis and his co-defendant

Rickman, exited the vehicle and entered the rear door of the motel. (T. 53). They later returned and were seen with a brown briefcase. (T. 258, 263).

After the aforesaid sampling of the cocaine, Hoskins left the agent's room and returned with a brown paper bag. (T. 373). From this bag he produced a set of scales and a clear, plastic bag of white powder. (T. 375). The plastic bag was weighed by Hoskins, who stated that it was a little over a pound. (T. 381). The undercover agent inquired about seeing a second pound of cocaine, but Hoskins asked to see some money before producing the additional cocaine. (T. 382-383).

With this development, ten to fifteen minutes after the vehicle from Alabama arrived (T. 53), the undercover agent went to his automobile to obtain money for the drug purchase. This was a pre-arranged signal for the other agents in the area to move in for the arrest. (T. 52, 383). Police officers entered the agent's room, room 107, and knocked at the adjacent room, number 105. (T. 55-56, 387-388). After announcing that they were police officers, they heard flushing noises and running water. Upon using the motel manager's pass key, the officers entered the room and found Petitioner Ellis and co-defendant Rickman within. (T. 55, 61, 388, 393).

Petitioner Ellis struggled with one of the agents and was wrestled to the floor. (T. 61). Co-defendant Rickman was in the bathroom and eventually engaged in a short confrontation with agent Ash. Police officers observed white powder on the rim of the toilet which was collected and later identified as cocaine. (T. 63, 108). A plastic bag which had been torn open, was also found in the bathroom. It contained white residue which was also later determined to be cocaine. (T. 88, 92, 107). Ellis, Hoskins, Rickman, and Klutz were all arrested and charged with the sale of cocaine. Ms. Klutz pled guilty, and as noted previously, the other individuals were convicted after a jury trial. (R. 3, 302).

After a lengthy hearing on the pre-trial motions, the case was called for trial on February 9, 1981. Petitioner Ellis rested at the conclusion of the state's evidence (T. 777), and his co-defendant Hoskins, then relied on the defense of entrapment. Co-defendant, Rickman rested without offering any evidence other than two exhibits, after Appellant Hoskins had completed the presentation of his defense. (T. 907). The trial was concluded on February 16, 1981 with the jury returning verdicts of guilty as to all three co-defendants. (R. 302). Additional facts may be related in the following portion of this brief to more fully explain Respondent's arguments.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. NO QUESTION OF CONSTITUTIONAL MAGNITUDE IS PRESENTED AS A RESULT OF THE TRIAL COURT'S REFUSAL TO PERMIT THE PETITIONER AND HIS COUNSEL TO WITHDRAW FROM THE COURTROOM AFTER THE PRESENTATION OF THE STATE'S CASE AND AFTER THE PETITIONER HAD RESTED HIS CASE.

Under Petitioner's first argument, he appears to assert that his fundamental right to due process was violated as a result of the trial court's refusal to allow the Petitioner and his attorney to withdraw from the

courtroom and waive his presence at trial after the State had rested its case and Petitioner Ellis had stated that he intended to also rest without presenting any evidence. Petitioner also asserts that the refusal of the trial court to permit this waiver operated to deny the Petitioner effective assistance of counsel, since it thwarted a considered trial strategy.

A review of the record in this case shows that after the State and Petitioner had rested, the trial court took up several matters outside the presence of the jury. Among these was Petitioner's request that he and counsel be permitted to withdraw from the remaining proceedings and not be present in court until the final argu-

ments were made. (T. 77-79). Petitioner's rationale was that since the state had rested, and since Petitioner had also rested without presenting any evidence, any further evidence beyond that point could not be considered by the jury against the Petitioner, even though his co-defendants had not yet opted to either rest or present a defense.

Of course, as has been previously noted, Petitioner was tried jointly with two other individuals who were proven to be co-conspirators. Co-defendant Hoskins relied upon the defense of entrapment, and testified that Petitioner Ellis and his co-defendant Rickman had nothing to do with the cocaine deal. Hoskins testified that Ellis was at the Best Western

Motel, because he and Ellis had previously discussed the possibility of Hoskins' purchasing some paintings and oriental rugs from Ellis. Hoskins allegedly left word with his mother that if Ellis should telephone his home, Hoskins could be reached at a particular phone number. When Ellis allegedly called, Hoskins told him to come to the motel, because Hoskins felt insecure and believed that if Ellis was present, he would deter any potential violence. (T. 851-853, 903-905). Thus, there was absolutely no incriminating evidence from Hoskins relating to either Petitioner Ellis or his co-defendant, Rickman. Rickman rested his case, without testifying, immediately after Hoskins had rested his case. (T. 908).

In reviewing the question of whether or not the trial court erred by refusing to allow Petitioner to excuse himself from the courtroom, the Georgia Court of Appeals noted that under Georgia law, a criminal defendant has the constitutional right to be present at all stages of his trial; however, the exercise of this right may be waived. Ellis v. State, 164 Ga. App. 366, 370, 296 S.E.2d 726 (1982), citing, Wilson v. State, 212 Ga. 73, 90 S.E.2d 557 (1955); Ga. Const., Art. I, Sec. 1, Para. II. This same rule applies under federal law. U.S. Const., Amend. IV; Pointer v. Texas, 380 U.S. 400 (1965).

Notwithstanding Petitioner's right to waive his presence at trial; there is no constitutional provision which

guarantees that a trial court must always recognize a criminal defendant's right to exercise said waiver. Petitioner has cited no cases to this Court to the contrary.

In fact, it is clear that under federal law a waiver of a constitutional right is not guaranteed. For example, a knowing and intelligent guilty plea waives numerous constitutional rights such as the right to call and confront witnesses, the right to a jury trial, and the right to force the state to prove its case beyond a reasonable doubt. Yet, a criminal defendant has no absolute right to waive trial and plead guilty. Santobello v. New York, 404 U.S. 257, 262 (1971); North Carolina v. Alford, 400 U.S. 25, 39 (1970);

Lynch v. Overholser, 369 U.S. 705, 719 (1962).

There appears to be little case authority regarding a defendant's right to absent himself from trial or a portion of trial; however, the authority that Respondent has been able to locate supports the conclusion that it is within the sound discretion of the trial court to permit or refuse to permit such an absence. See In Re United States, 597 F.2d 27 (2nd Cir. 1979); United States v. Moore, 466 F.2d 547 (3rd Cir. 1972); United States v. Meinster, 481 F.Supp. 1112 (S.D. Fla. 1979). Here, there was no abuse of discretion. The state was proceeding under the theory that Petitioner Ellis was a party to the crime, and that he engaged in a conspiracy

with his co-defendants Rickman and Hoskins to sell cocaine. Since there were no conflicting defenses, and since all of the prosecutions arose out of the same transaction, the cases of all three co-defendants were tried jointly. The Georgia Court of Appeals noted that the acts of Petitioner's co-defendant Hoskins, would have been admissible against the Petitioner to show the distribution and delivery of the cocaine, for which all three co-defendants were charged.

Furthermore, Petitioner has failed to demonstrate how his mere presence in the courtroom could have harmed him, when he voluntarily was present through the initial stages of the trial when the state presented its case in chief. The rebuttal evidence

submitted following Appellant Hoskins' testimony certainly was no more damaging to the Petitioner than the state's case in chief.

Additionally, there is no merit to Petitioner's assertion that he was denied effective assistance of counsel as a result of the trial court's refusal to permit Petitioner to leave the courtroom. Of course, as Petitioner notes, Petitioner's request to leave the courtroom following the state's case was a trial tactic attempted by trial counsel; however, the trial court's refusal to permit this action did not deprive Petitioner of counsel reasonably likely to render and rendering reasonably effective assistance considering the totality of the circumstances and counsel's repre-

sentation throughout trial. See Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982); McMann v. Richardson, 397 U.S. 759, 771 (1970). A defendant who claims he was deprived of effective assistance of counsel must meet the threshold requirement of showing that his attorney's conduct was not within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, supra; Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Furthermore, in order to establish an ineffective assistance claim, a petitioner must show actual and substantial detriment as a result of counsel's ineffectiveness. Washington v. Strickland, supra.

A review of counsel's overall performance in this case throughout Peti-

tioner's trial clearly demonstrates that he was not rendered ineffective simply because Petitioner was not permitted to leave the courtroom while one of his co-defendant's testified and while the state presented rebuttal evidence. Whether the Petitioner was in the courtroom or out of the courtroom, the jury certainly could have considered all of the evidence presented after Petitioner rested his case in regards to how it related to Petitioner.

Since Petitioner has failed to demonstrate that the trial court abused its discretion in refusing to permit him to leave the courtroom, and since said ruling by the trial court did not deprive Petitioner of effective assistance of counsel, this Court

should find no merit to Petitioner's first argument.

II. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR SEVERANCE.

Under his second argument, Petitioner asserts that he was denied due process as a reslt of the trial court's refusal to sever his case from those of his co-defendants. In this regard, Petitioner argues that especially after the State and Petitioner had rested, further evidence relating to Petitioner's co-defendants, especially co-defendant Hoskins, was inherently prejudicial to the Petitioner and likely resulted in his conviction based upon guilt by association. Petitioner claims that his defense was antagonistic to that of Hoskins, that the evidence was confusing as to

each of the co-defendants and there was a likelihood that evidence admissible only against one would be considered against the other co-defendants and the "spill-over" contributed to Petitioner's conviction.

Under Georgia, as well as federal law, the refusal to grant a severance justifies a reversal only where the trial court has abused its discretion. Demps v. Wainwright, 666 F.2d 224, 227 (5th Cir. 1982); United States v. Berkowitz, 662 F.2d 1127, 1132 (5th Cir. 1981); Baker v. State, 238 Ga. 389, 391, 233 S.E.2d 347 (1977); Reaves v. State, 242 Ga. 542, 546, 250 S.E.2d 438 (1978). The burden is upon the defendant to make a clear showing of prejudice by demonstrating that he received an unfair

trial and that he suffered compelling prejudice against which the trial court was unable to afford protection. United States v. Berkowitz, supra, 662 F.2d at 1132; United States v. Sheikh, 654 F.2d 1057, 1065 (5th Cir. 1981). To compel severance, the defenses of co-defendants must be more than merely antagonistic--they must be antagonistic to the point of being mutually exclusive or irreconcilable. United States v. Marable, 574 F.2d 224, 231 (5th Cir. 1978); United States v. Mota, 598 F.2d 995, 1001 (5th Cir. 1979), cert denied, 444 U.S. 1084 (1980).

As noted in the previous statement of facts, the theory upon which the State relied at trial was that Petitioner's co-defendant Hoskins, ar-

ranged to have people from Alabama bring cocaine to Cobb County, Georgia. (T. 49, 345). The drug deal was delayed until the car arrived from Alabama. (T. 351). Approximately an hour after Hoskins, Elaine Klutz, the Cobb County undercover agent, and the informant arrived at the Best Western Motel, Petitioner Ellis and Rickman arrived at the motel in a Trans-Am automobile. The vehicle had Alabama license plates. Prior to their arrival, Hoskins provided a sample of the cocaine for the undercover agent. (T. 353-354, 53, 257). After Petitioner Ellis and Rickman initially entered the motel, they were later observed returning to their vehicle where they retrieved the brown briefcase. (T. 258, 263, 321). The undercover agent

identified the briefcase found in room 105 of the motel to be the same briefcase that came out of the Trans-Am. (T. 259). Shortly after the arrival of Ellis and Rickman in the Trans-Am, the undercover agent exited the motel indicating that surveillance officers should move in for the arrest. (T. 52-53, 321, 383). When agents entered room 105, Petitioner Ellis confronted them at the door. (T. 723). Rickman was in the bathroom (T. 572), where the toilet was flushing and the tub water was running. (T. 576). A wet plastic bag was found in the bathtub and residue in the bag was later determined to be cocaine. (T. 107, 579). Cocaine residue was also found on the toilet rim. (T. 63, 108).

In its review of Petitioner's case on direct appeal, the Georgia Court of Appeals noted that under the theory of conspiracy the acts and statements of each of the participants in the criminal enterprise was admissible against the other members of the conspiracy. "Thus, whether such evidence was admitted at a severed trial or at a joint trial, the effect and impact legally is the same." Ellis v. State, supra, 164 Ga. App. at 369.

Contrary to Petitioner's assertions, the entrapment defense of Hoskins was not actually antagonistic to Petitioner's general assertion of innocence. In fact, co-defendant Hoskins' testimony at trial was favorable to the Petitioner in that he attempted to totally exculpate both Pe-

titioner and Rickman. (T. 905, 851-853). Petitioner Ellis also complains that he suffered prejudice because he could not cross-examine co-defendant Hoskins because he had rested his case. Of course, this was only by the Petitioner's own choice and not because the witness was unavailable. In fact, Petitioner did cross-examine a State rebuttal witness.

Here, since there has been no clear showing of harm or prejudice and since Petitioner did not meet his burden in the trial court of showing more than the mere possibility that separate trials would give him a better chance of acquittal, the trial court did not abuse its discretion in denying his motion and renewed motions for severance.

III. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY, IN ACCORDANCE WITH PETITIONER'S REQUEST, THAT IT WAS NOT TO CONSIDER ANY EVIDENCE AGAINST THE PETITIONER WHICH HAD BEEN INTRODUCED AFTER HE RESTED HIS CASE.

After Petitioner rested his case without presenting any evidence and renewed his motion for severence, he requested an instruction from the trial court that the jury should not consider any further evidence which might be presented against him. Petitioner Ellis' co-defendant, Rickman, also requested a similar instruction after he rested. These requests were refused by the trial court.

The Georgia Court of Appeals found that such a requested charge would have been inappropriate in light of Ga. Code Ann. § 26-801, now O.C.G.A. § 16-2-20. That code section provides:

> Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
>
> (b) A person is concerned in the commission of a crime only if he:
>
> (1) Directly commits the crime;
>
> (2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacities;
>
> (3) Intentionally aides or abets in the commission of the crime; or
>
> (4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

Furthermore, the trial court also instructed the jury on Georgia law

pertaining to conspiracy. Under O.C.G.A. § 16-4-8; Ga. Code Ann. § 26-3201:

> A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.

Under either the state's conspiracy theory or as a party to the cime, evidence pertaining to actions or statements by Petitioner's co-defendants pursuant to or in furtherance of the conspiracy was admissible against the Petitioner. United States v. James, 590 F.2d 575 (5th Cir. 1979); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979), cert denied, 444 U.S. 886 (1979).

Petitioner is incorrect when he argues that the State's evidence to

support the aforesaid conspiracy and parties to a crime theories came out after Petitioner had rested. Indeed, from the very inception of the State's case, the aforesaid theories on conspiracy and parties to a crime were the central focus regarding Petitioner and his co-defendant Rickman.

Additionally, it is clear that Petitioner was not prejudiced by any evidence that came in after he rested, since even Petitioner's counsel recognized that in regards to Petitioner, all of the additional evidence was exculpatory. (T. 995). Although tape recordings of the cocaine deal were played for the jury, neither Petitioner nor Rickman's voice was heard on the recording nor were their names ever mentioned. (T. 933). When the

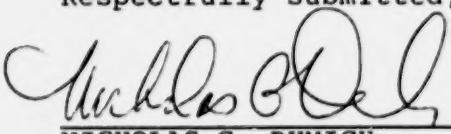
informant, Rick Martin, testified in rebuttal, he admitted that he had never observed Rickman or Ellis in possession of the cocaine, nor did he see them entering the motel with anything in their hands. (T. 948, 974). As noted previously, co-defendant Hoskins testified that Ellis and Rickman had nothing to do with the drug sale. (T. 851-853, 903-905).

Thus, since Petitioner was not prejudiced by the trial court's refusal to give his requested instruction, and since the instruction was an incorrect statement of Georgia law, this Court should find no merit to Petitioner's third and final argument.

CONCLUSION

For all of the aforesaid reasons, this Court should deny the petition for writ of certiorari which has been filed in this case.

Respectfully submitted,



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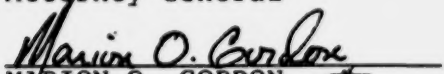

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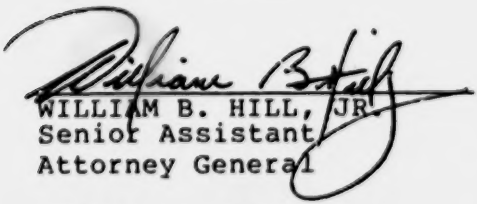

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent by depositing a copy of same in the United States mail, with sufficient postage affixed thereon, and addressed to:

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This 20 day of May, 1983.

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